

D.T.E. 99-61-5-A

Adjudicatory proceeding regarding the complaint of Carlos Cruz concerning the services provided by Qwest Communications.

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ORDER CONCERNING  
MOTION TO STAY ENFORCEMENT OF THE DEPARTMENT'S DIRECTIVES

APPEARANCES:

Carlos Cruz  
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PRO SE  
COMPLAINANT

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FOR: Qwest Communications  
RESPONDENT

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I. INTRODUCTION

On June 25, 1999, Carlos Cruz ("Complainant"), pursuant to G.L. c. 93, § 108 et seq., filed a complaint with the Department of Telecommunications and Energy ("Department") alleging that Qwest Communications, Inc. ("Qwest" or "Company") switched his long-distance telephone service without authorization. On September 29, 1999, the Department conducted an evidentiary hearing concerning the merits of Mr. Cruz' complaint. On December 10, 1999, the Company filed a Motion to Dismiss the case claiming that the Department failed to notify Qwest of the outcome in Mr. Cruz' complaint within the statutorily-imposed deadline. The Motion to Dismiss was denied by the Hearing Officer in a ruling issued on February 14, 2002. The Company filed an untimely appeal on February 25, 2002 which the Department denied.

On May 20, 2002, the Department issued an Order finding that Qwest switched the Complainant's long-distance telephone service without proper authorization. Moreover, in accordance with G.L. c. 93, § 112(a), the Department directed Qwest to remit to Mr. Cruz' previous interexchange carrier ("IXC") the amount that it would have received from him had Qwest not switched the service. Further, pursuant to G.L. c. 93, § 112(b), the Department directed Qwest to remit to the Department the amount of two thousand dollars (\$2,000.00) as a penalty for the illegal switch of Mr. Cruz' long-distance service.<sup>1</sup>

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<sup>1</sup> Although not the situation here, in its Order the Department noted that an IXC determined by the Department to have intentionally, maliciously or fraudulently switched the service of more than 20 customers in a 12-month period, may be prohibited from selling telecommunications services in the Commonwealth for a period  
(continued...)

On June 6, 2002, Qwest filed a Petition and Notice of Appeal with the Supreme Judicial Court, pursuant to G.L. c. 25, § 5, seeking to have the Department's Order set aside. Qwest subsequently filed with the Department a Motion to Stay Enforcement of the Department's Order ("Motion"). As a basis for its Motion, Qwest simply states that the interests of justice strongly suggest that a stay is necessary (Motion at 1). The Company contends that the relief sought would not adversely affect the public, because the Department provided no date by which to remit the \$2,000 fine in its Order (id.).

## II. STANDARD OF REVIEW

In determining whether to grant a stay pending judicial appeal of a Department order, the Department considers: (1) the likelihood that the moving party will prevail on the merits of the appeal; (2) the likelihood that the moving party will be harmed irreparably absent a stay; (3) the prospect that others will be harmed if the Department grants the stay; and (4) the public interest in granting the stay. Fitchburg Gas and Electric Light Company v. Department of Telecommunications and Energy, No. SJ-2001-0298 at 2 (November 16, 2001) (order denying motion for stay), Boston Edison Company, D.P.U. 92-130-A at 7, n.7 (1993); Appeal of Robert K.M. Lynch, D.P.U. 88-203-A at 5 (1990). The Department also considers: (1) whether there are far-reaching consequences of a specific adjudicatory decision that is being litigated on appeal; (2) the impact upon the parties pending appeal of a novel and complex case; or (3) whether significant legal issues are involved. Stow Municipal Electric Department,

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<sup>1</sup>(...continued)

of up to one year. G.L. c. 93, § 112(b).

D.P.U. 94-176-A at 2 (1996).

### III. ANALYSIS AND FINDINGS

The Department believes that, based on the merits of the case, it is unlikely that Qwest will succeed in its appeal. In Cruz v. Qwest Communications Corporation, D.T.E. 99-61-5 (2002), the Department based its decision that Qwest switched the Complainant's long-distance telephone service without authorization on uncontradicted evidence. Specifically, Qwest could not provide the Department with a third party verification recording, as required by G.L. c. 93, § 109(a). Moreover, the fine levied by the Department on Qwest for the unauthorized switch of the Complainant's long-distance telephone service is allowed pursuant to G.L. c. 93 § 112(b). Simply stated, Qwest was fined by the Department because it was the fourth time within a consecutive twelve month period that we found that the Company failed to establish that a change in a consumer's long distance telephone service was authorized by either (1) a valid letter of agency or (2) a third party verification recording, as is mandated by G.L. c. 93 §109(a).<sup>2</sup> Thus, the Department determines that Qwest is not likely to succeed on the merits of its appeal.

Similarly, the Department determines that Qwest will not be harmed irreparably absent a Stay.<sup>3</sup> The Company stated that it had credited the charges that Mr. Cruz incurred as a result of Qwest's illegal change in his long-distance telephone service prior to the date of the

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<sup>2</sup> See, Agnes T. Nee v. Qwest Communications, Inc., D.T.E. 99-61-19 (1999), Robert J. Lima v. Qwest Communications, Inc., D.T.E. 99-61-20 (2000), and Patricia Garcia-Rios v. Qwest Communications, Inc., D.T.E. 00-22-5 (2001).

<sup>3</sup> The Department notes that in its Motion, Qwest failed to make the argument that absent a Stay the Company would be harmed irreparably.

Department's Order. Thus, the failure to Stay the Department's directive to credit Mr. Cruz' account for charges he incurred by Qwest would not harm the Company irreparably. Further, the Company would not be harmed irreparably as a result of the Department's imposition of a two thousand dollar (\$2,000.00) fine levied due to Qwest's repeated violation of G.L. c. 93, § 108 et seq. The loss of money during the pendency of litigation does not constitute irreparable harm where a party, if it ultimately prevails, will have the right to get the money back at the conclusion of litigation. Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Company, 399 Mass. 640, 643 (1987). Thus, the Department finds that the failure to grant a Stay would not harm irreparably the Company's financial integrity.

Moreover, the Department believes that others would be harmed if the Department grants the Stay. While the parties to this docket are limited to the Complainant and the Company, the Department directed Qwest to remit payments owed by the Complainant to his intended long-distance provider. By granting the Stay, the Complainant's authorized long-distance carrier would not receive payments to which the company was legally entitled. Thus, the Department finds that others would be harmed if the Department grants the Stay.

Finally, the Department notes that G.L. c. 93 § 108 et seq. was enacted by the General Court to protect consumers from the unauthorized switch of their telephone service providers. Thus, it is inconceivable that granting the Stay would be in the public interest. Accordingly, the Department finds that: (1) Qwest's appeal is not likely to be successful based on the merits of the Company's arguments; (2) Qwest would not be irreparably harmed as a result of the failure to grant the Stay; (3) others would be harmed if the Department granted the Stay; and

(4) granting the Stay is not in the public interest. Therefore, the Department denies Qwest's Motion to Stay Enforcement of the Department's Order.

IV. ORDER

After review and consideration, it is

ORDERED: That the Motion to Stay Enforcement of Department's Order submitted by Qwest Communications Corporation is denied.

By Order of the Department,

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Paul B. Vasington, Chairman

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner